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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

No. .....

CLARENCE FRANCOIS, Petitioner,

v.

RAYBESTOS-MANHATTAN, INC. et al.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATED COURT OF APPEALS FOR THE NINTH CIRCUIT

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59 pp

QUESTION PRESENTED

Whether admiralty jurisidiction extends to a product liability action in which plaintiff was exposed to maritime asbestos products in the performance of his normal work as a ship painter aboard vessels undergoing repair while afloat on navigable waters.[1/]

1/ Encompassed within the Question Presented is the issue whether the activities of a ship painter bears a sufficient relationship to traditional maritime activities such that admiralty jurisdiction extends over tort claims for asbestos-related injuries arising therefrom.

LIST OF ALL PARTIES TO THE PROCEEDING

Plaintiff: Clarence Francois

Defendants: Raybestos-Manhattan, Inc.; Owens-Illinois Corporation; Owens-Corning Fiberglas Corporation; The Celotox Corporation; Armstrong Cork Company; Nicolet Industries, Inc.; H.K. Porter Company, Inc.; A C & S, Inc.; American Asbestos Textile Corporation; Esbestone Corporation; Atlas Asbestos Company; Baldwin-Ehret Hill, Inc.; Claremont Company, Inc.; Combustion Engineering, Inc.; Crown Cork and Seal; Eagle Picher Industries; Empire-Ace Insulation Manufacturing Corporation; Fibreboard Corporation; The Flintkote Company; Forty-Eight Insulations, Inc.; GAF Corporation; Garlock, Inc.; Huron Cement Division of National Gypsum Corporation; J.P. Stevens & Co., Inc.; Kaiser Cement Corporation; Keasby and Mattison Company; Keene Billing Products Corporation; Keene Corporation;

Mundet Cork, Inc.; National Gypsum Corporation; Pabco, Inc.; Philip Carey Manufacturing Company; Pittsburg Corning Corporation; Pittsburg Plate Glass Industries, Inc.; Ruberoid Company; Sepco Corporation; Smith Asbestos Products, Inc.; Southern Asbestos Company; Standard Asbestos Manufacturing and Insulating Company; Plant Insulation Company; United States Gypsum Company; Atlas Turner, Inc.; Thorpe Insulation Company; Rock Wool Manufacturing Company, Inc.; Ryder Industries; Garlock Packing Company; Blackhawk Gasket Company; Sacomo Manufacturing Company; Sacomo Sierra, Inc.; Union Carbide Corporation; John Crane; Niatic Rubber Company; East Bay Gasket, Incl; Flexitallic Gasket Company, Inc.; Colt Industries, Inc.; Devcon Corporation; The Manville Corporation; American Asbestos Products Company; Delaware Asbestos and Rubber; Eastern

Refactories; E.I. DuPont de Nemours; General Veneer Manufacturing Company; Georgia Pacific Corporation; Grant Wilson Corporation; Kaiser Steel Corporation; Kaiser Aluminum and Chemical Corporation; Asarco, Incorporated; Lear Siegler, Inc.; North American Asbestos Corporation; George Short Company; Gasket Specialities, Inc.; Turner-Newall Industries, Inc.; Synkploid Company; Western Mac Arthur Company; Norton Company; Remington Industries; Western Asbestos Company, Babcock & Wilcox.

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IN THE

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October Term, 1984

No. _____

CLARENCE FRANCOIS, Petitioner,

v.

RAYBESTOS-MANHATTAN, INC, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

The petitioner Clarence Francois respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on November 13, 1984.

OPINION BELOW

The Memorandum of the Court of Appeal, which will not be reported (See Memorandum (Court of Appeal), November 13, 1984, p. 1:23-26), appears in the Appendix hereto. The opinion of the District Court for the Northern District of California was rendered by the Honorable Robert F. Peckham on November 30, 1983, and appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeal for the Ninth Circuit was entered on November 13, 1984. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 28:

§ 1333. Admiralty, maritime and prize cases

The district courts shall have orig-

inal jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

(2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize.

STATEMENT OF THE CASE

Commencing in the late 1940's, and for some thirty-five years thereafter, petitioner Clarence Francois was employed as a shipboard painter in the San Francisco Bay Area. In connection with his regular duties as a painter, he was exposed to asbestos and asbestos-containing maritime products aboard the ships. His exposure occurred during the repair of completed vessels then in service, which were lying in navigable waters. Petitioner's claim is based on the injuries and damages he

sustained as a proximate result of his inhalation of and exposure to asbestos fibers.

The first amended complaint for damages in this action was filed by petitioner against 77 defendants on September 27, 1983 in the United States District Court for the Northern District of California. The action was brought in the federal court on allegations of admiralty and maritime jurisdiction under the terms of Rule 9(h) of the Federal Rules of Civil Procedure. It alleges that petitioner "worked in the repair of completed vessels involved in service in water-based commerce and that his handling of and/or exposure to asbestos products referred to herein arose during such activity." (First amended complaint at p. 3:6-9.)

Motions to dismiss the first amended complaint were brought by various of the

respondents,[1] based on lack of subject matter jurisdiction, failure to state a claim, and lack of personal jurisdiction. However, the District Court, in its Memorandum of Decision ordering dismissal, held that the subject matter jurisdiction issue was dispositive, and issued its ruling on that single ground. (Memorandum of Decision, November 30, 1983, at pp. 2:9-11, 11:4-5; Judgment, December 1, 1983, at lines 23-25.)

The judgment of dismissal for lack of subject matter jurisdiction was rendered by the District Court, and affirmed by the Court of Appeal, on the sole ground that

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1/ The defendants participating in the motions were: Armstrong World Industries, Inc.; U.S. Gypsum Co.; The Flintkote Co.; Fibreboard Corp.; Keene Corp.; Keene Building Products Corp.; Owens-Corning Fibreglass Corp.; Nicolet, Inc.; Celotex Corp.; PPB Industries; ACands, Inc.; Standard Insulations, Inc.; Eagle-Pitcher Industries, Inc.; Pittsburgh Corning Corp.; Combustion Engineering, Inc.

the activities of Petitioner as a shipboard painter did not bear a sufficient relationship to traditional maritime activities to be maintainable as an admiralty claim. (Memorandum (Court of Appeal), November 13, 1984, pp. 1:18-21, 2:10-18.)

REASONS FOR GRANTING THE WRIT

1. THERE IS CONFLICT BETWEEN THE DECISIONS OF THE COURTS OF APPEAL

Section 1333(1) of Title 28 provides that the federal court shall have jurisdiction over all admiralty or maritime claims. This statute has historically been held to extend admiralty jurisdiction over all torts occurring on the high seas or navigable waters. See, e.g., The Plymouth, 70 U.S. (3 Wall.) 20, 36 (1866).

In Executive Jet Aviation, Inc. v. City of Cleveland, 404 U.S. 249, 92 S.Ct. 402, 30 L.Ed.2d 418 (1972), the Court articulated a new standard for defining

the scope of admiralty jurisdiction over tort claims, rejecting the traditional "locality" test. Executive Jet supplemented the simple locality test by adding the further requirement that the wrong alleged bear "a significant relationship to traditional maritime activity." 404 U.S. at 268.

Executive Jet thus imposes a "two-prong" test for invoking the admiralty jurisdiction of the federal court: locality of the injury, and a nexus to traditional maritime activity.

There currently exists irreconcilable conflict between the decisions of the Courts of Appeal in applying the Executive Jet test to asbestos cases involving shipyard workers. By 1983 the First Circuit had noted that "there is already some disagreement among the circuits both as to the proper analysis and as to the ultimate resolution of this issue." Austin v.

Unarco Industries, Inc., 705 F.2d 1, 9 (1st Cir. 1983), cert. dismissed, _____ U.S. _____, 104 S.Ct. 34, 77 L.Ed.2d 1454 (1983).

Within the past four years, at least six circuits have had occasion to apply the two-prong Executive Jet test to the claims of shipyard workers alleging injury from asbestos exposure. The First, Second, Ninth and Eleventh Circuits have all denied admiralty jurisdiction over such claims; the Fifth Circuit has stated that such jurisdiction might conceivably be pleaded; and the Fourth Circuit has held admiralty jurisidiction to apply. Each of the circuits has adopted a different test or set of standards to determine whether the second (nexus) prong of the Executive Jet test for admiralty jurisdiction is satisfied by a shipyard worker's claims, however. The Ninth Circuit in particular has failed to adopt a

single test and retain it. Depending upon which test for nexus is applied, the resolution of admiralty jurisdiction may differ under the facts of a given case, and would in fact do so here.

The earliest significant case of this post-Executive Jet, shipyard asbestos progeny is White v. Johns-Manville Corp., 662 F.2d 234 (4th Cir. 1981), cert. denied, 454 U.S. 1163, 102 S.Ct. 1037, 71 L.Ed.2d 319 (1982) ("White II"). The plaintiffs there were shipyard workers who contracted asbestos-related diseases from installing asbestos insulation during construction and repair of ships. The District Court had denied admiralty jurisdiction on the ground that plaintiffs' "injuries bore no reasonable relationship to traditional maritime activity." 662 F.2d at 238.

The Court of Appeal, recognizing that the case was one of products liability and

that such cases were cognizable in admiralty (id. at 239, and authorities there cited), ruled that the test for resolving the second, or nexus, prong of Executive Jet is to examine the function of the shipyard workers involved. 662 F.2d at 239. Reasoning that the ships could not perform their intended function without the plaintiffs' installation of asbestos, and that the installation therefore "has a direct effect on maritime navigation and commerce," the Court ruled that the plaintiffs' activities did bear a significant relationship to traditional maritime activities, and allowed the suit to proceed in admiralty. Id. The Court also, however, imposed the limitation that the allegedly defective product have been intended strictly for maritime use. Id. at 240.

In sum, the Fourth Circuit adopted a test for nexus which consists of two

factors: (1) whether the function of the shipyard worker advances maritime commerce, and (2) whether the product was intended only for maritime use. Accord: White v. Johns-Manville Corp., 662 F.2d 243 (4th Cir. 1981, "White I"); Glover v. Johns-Manville Corp., 662 F.2d 225 (4th Cir. 1981).

If the Fourth Circuit's approach is applied to the case of Petitioner Francois herein, his case should have been permitted in admiralty, since his function as a shipyard painter is patently essential to maritime commerce, and his complaint alleges the maritime nature of the asbestos products he was exposed to.

In Owens-Illinois v. United States District Court, 698 F.2d 967 (9th Cir. 1983), the Court focused on the distinction between new ship construction and ship repair, reasoning that a contract for repair of a vessel is considered maritime,

but a contract for ship construction is not. 698 F.2d at 970. Since the plaintiffs there were involved in ship construction, which lacked "maritime flavor," their claims were held to be outside the jurisdiction of admiralty. Id. In so holding, the Court expressly declined to follow the holding, or the reasoning, of White II, supra. Id. at 971.

If the test of Owens-Illinois were applied to Petitioner herein, again his claim in admiralty should stand, since he worked on the repair of completed ships.

In Keene Corp. v. United States, 700 F.2d 836 (2d Cir. 1983), cert. denied, ___ U.S. _____, 104 S.Ct. 195, 78 L.Ed.2d 171 (1983), the Court also expressly declined to follow the Fourth Circuit's approach in White II (700 F.2d at 844-845) and, like the Ninth Circuit, instead placed emphasis on the repair/construction distinction. 700 F.2d at 844. The Keene Court addi-

tionally, however, adopted the requirement of White II that the offending product have been designed for exclusive maritime use. Id. The Second Circuit thus adopted a hybrid of the approaches of White II and Owens-Illinois. Because the allegations of the complaint there were insufficient to meet the test it adopted, the claims were barred from admiralty.

But again, applying those factors to Petitioner's claim here, admiralty jurisdiction is proper because of his allegations that he worked repairing completed vessels and that the asbestos products to which he was exposed were maritime.

In Austin v. Unarco Industries, Inc., supra, 705 F.2d 1, the First Circuit opted to focus on the nature of the worker's job alone, rather than distinguish between ship construction and repair (705 F.2d at 10) or whether the injuring products were designed exclusively for maritime use (id.

at 9-10). Thus the Court concluded that admiralty jurisdiction would lie to protect the interests of those who perform work traditionally done by seamen. Id. at 11. Since the work done by the plaintiffs in that cases required special skills, the Court refused to invoke its admiralty jurisdiction. Id. at 14.

Petitioner respectfully submits that if such is the proper test, then he clearly fell within its parameters, for routine maintenance and repair, of which shipboard painting is the sort, has historically been performed by members of a ship's crew as a part of their regular duties, analogously to stevedoring. (See, Austin at 11.)

Again, however, the import of Austin insofar as this Petition is concerned is that the First Circuit has adopted yet another standard by which to determine the nexus prong of Executive Jet, expressly

rejecting those previously articulated by the Fourth (White II), Ninth (Owens-Illinois) and Second (Keene) Circuits.

In Lowe v. Ingalls Shipbuilding, A Div. of Litton, 723 F.2d 1173 (5th Cir. 1984), the Court adopted the rule enunciated by the Ninth Circuit in Owens-Illinois (723 F.2d at 1189), and expressly rejected the Fourth Circuit's approach (id.). That is, the Fifth Circuit adopted the ship repair/ship construction distinction test. Without expressly deciding the issue, the Court also indicated its approval of the Austin Court's approach in distinguishing between traditionally maritime activities of shipyard workers, who could bring claims in admiralty, and activities requiring specialized skills, which could not be brought in admiralty. Id. at 1190.

In Harville v. Johns-Manville Products Corp., 731 F.2d 775 (11th Cir. 1984), the

Court recognized that the "other Courts of Appeal that have faced this issue have demonstrated little agreement about those factors that are critical to the 'nexus' analysis." 731 F.2d at 783. After a brief review of each of the cases outlined hereinabove, the Court declared:

> Although each of these courts has examined a factor or factors that we consider important to the proper analysis of the nexus requirement, we believe that exclusive focus on any single aspect of the plaintiffs' claims produces a mechanistic analysis not entirely consistent with the thrust of Executive Jet.
>
> 731 F.2d at 784.

It thus adopted a four-factor test, considering (1) the function and role of the parties, (2) the types of vehicles and instrumentalities involved, (3) the causation and type of injury, and (4) traditional concepts of the role of admiralty law. Id. at 784-785.

Placing special emphasis upon "the extent to which the plaintiff's claims

implicate the purposes of maritime jurisdiction" (id. at 784), the court concluded that asbestos injuries, which are not uniquely maritime and in which the involvement of a vessel "is at most tangential" (id. at 785), are not the sort of claims with which admiralty is concerned, and rejected such jurisdiction. 731 F.2d at 786.

Most recently the Ninth Circuit decided Myhran v. Johns-Manville Corp. 741 F.2d 1119 (9th Cir. 1984). The plaintiff there was a pipefitter engaged in the repair of completed ships on navigable waters who was exposed to asbestos. If it had followed its own test established in Owens-Illinois, supra, the Ninth Circuit Court of Appeals would have held that the plaintiff's claim was cognizable in admiralty, because he repaired completed ships.

The Court instead, however, retreated

from its earlier opinion, stating that "to uphold admiralty jurisdiction by applying a mechanical analysis based solely on the distinction between repair and construction of ships would be inconsistent with the Supreme Court's analysis in Executive Jet." 741 F.2d at 1121. It then more firmly adopted the four-factor test established in Harville, supra (to which it had itself paid lip-service in Owens-Illinois). Id. at 1122. In doing so, it also cited with approval the First Circuit's suggestion in Austin, supra, that the determination of jurisdiction must be based upon the work actually performed by the injured worker. Id.

Ultimately the Court concluded, as had the Eleventh Circuit in Harville, that admiralty law is simply not concerned with asbestos-related injuries (id. at 1122, 1123), that the plaintiff's duties (pipefitting) were not those traditionally

done by seamen, but were specialized (id. at 1122), that the involvement of ships was at most tangential (id.), and that plaintiff's injuries were therefore not covered by admiralty jurisdiction (id. at 1123).

The case of Petitioner herein was decided within the context of all of these cases. Considered in their entirety, they have generated a panoply of discrete and overlapping tests for determining jurisdiction, with disparate results:

> First Circuit -- traditionally maritime nature of job performed (no jurisdiction);
>
> Second Circuit -- (1) repair/construction distinction and (2) uniquely maritime product required (no jurisdiction);
>
> Fourth Circuit -- (1) function of shipyard workers and (2) uniquely maritime product (jurisdiction found);

Fifth Circuit -- Repair/construction distinction only (jurisdiction possible);

Ninth Circuit -- Originally, repair/construction distinction (no jurisdiction); currently "four-factor" approach (no jurisdiction); and

Eleventh Circuit -- "four-factor" approach (no jurisdiction).

Because Petitioner herein worked only in the repair of completed vessels, performing work requiring no special skills and arguably traditionally done by seamen (painting), and because his injuries were caused on-board by maritime asbestos products, it is respectfully submitted that the posture of his case is ideal for reviewing the prior decisions of the Courts of Appeal and adopting a uniform, clear standard to utilize in future cases.

Petitioner respectfully requests this Court to exercise its discretion to review

his case in order to articulate a single, standard approach to follow in determining the nexus requirement of Executive Jet with reference to shipyard asbestos suits.

2. THE DECISION OF THE NINTH CIRCUIT COURT OF APPEAL WAS IN ERROR

As a further ground for review of this case, Petitioner urges that, even following its own nexus test, the Ninth Circuit Court of Appeal erred in denying his claim under admiralty jurisdiction.

In Executive Jet, supra, this Court required merely that "the wrong bear a significant relationship to traditional maritime activity." 409 U.S. at 268. It was not held that the wrong be one existing solely in maritime activity. Thus, the cases indicating that asbestos injuries should not be decided in admiralty for the reason that such injuries are just as frequent (or moreso) in land-based commerce are misguided. See, e.g.,

Owens-Illinois at 971; Harville at 785.)

But more importantly, applying the four-factor approach adopted in Myhran, supra, the Court should have decided the jurisdiction issue in Petitioner's favor. The function of Petitioner's employment in this case was to keep ships in top-notch physical condition, thereby enhancing their ability to actively engage in maritime commerce. As pointed out by the Fourth Circuit in White II, supra, "[w]ithout such shipyard efforts, these vessels would have been unable to perform their maritime role as carriers of people and cargo." 662 F.2d at 239. The Court there also pointed out that asbestos insulation, like the paint applied by Petitioner, "by [its] very nature become[s] an appurtenance, or integral part, of the ship, [and] is clearly essential to the maritime industry." Id. Petitioner's function as a painter has a

direct effect on maritime commerce, and thus the first factor would appear satisfied.

The vehicles and instrumentalities involved, the second factor, were maritime vessels -- patently admiralty related -- and paint, which was applied directly to the ships to keep them in good repair. The reason for the painting was the marine activity of the ships, and it cannot be said that the relationship was "tangential."

The injury (third factor) was an asbestos-related disease or diseases caused by inhalation of fibers from maritime asbestos products. If not for the maritime use of the products aboard the ships, they would not have been there, and Petitioner would not have been exposed. While asbestos diseases are not uniquely maritime, it is submitted that they are not required by Executive Jet to be so;

the existence of noxious products aboard a sea-going vessel has definitely been decided to constitute unseaworthiness, with which the law of admiralty is most certainly concerned. See, e.g., Austin, supra, 705 F.2d at 12 ("unseaworthiness can arise not only from something as nautical as a faulty anchor windlass but from something as unmaritime as the presence on a ship of a hazardous chemical"); Smith v. Ithaco Corp., 612 F.2d 215 (5th Cir. 1980); Martinez v. Dixie Carriers, Inc., 529 F.2d 457 (5th Cir. 1976).

Finally, traditional concepts of the role of admiralty law, the fourth factor, militate in favor of applying admiralty jurisdiction here. Shipboard painting, like "swabbing the decks" and loading cargo, is historically a function of a ship's crewmembers. It is an activity requiring no special skills, is performed

routinely, and has a direct affect on maritime commerce.

For these reasons, admiralty jurisdiction should have been found.

3. A UNIFORM RULE IS DESIRABLE

Petitioner requests the Court's indulgence in taking judicial notice of the literally thousands of shipyard asbestos cases currently being litigated in the various courts of the nation. At least six federal judicial circuits have to date been required to rule on the availability of admiralty jurisdication as a forum for trying the cases. The results, as demonstrated hereinabove, have been far from uniform.

The decisions of the various circuits raise significant and recurring problems concerning efforts to invoke federal admiralty jurisdiction over shipyard asbestos injury cases.

At the present time, the determination

whether a plaintiff will be permitted to try his asbestos-injury case in admiralty depends on the fortuity of in which circuit he happens to be. Admiralty is an area that Congress has deemed wise to be controlled by the federal courts, ostensibly specifically <u>because</u> national uniformity in the field, involving widespread commerce as it does, is desirable. This Court should therefore decide, on a national scale, whether shipyard asbestos cases are properly heard in the admiralty forum.

CONCLUSION

For each of the reasons expressed herein, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit herein.

Respectfully submitted,

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February ___, 1985.

APPENDIX

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

CLARENCE FRANCOIS, Plaintiff, vs. RAYBESTOS-MANHATTAN, INC., et al., Defendants.	NO. C-83-2737 RFP MEMORANDUM OF DECISION

SUMMARY

The defendants in this asbestos action have filed three motions to dismiss: (1) a motion to dismiss for lack of subject matter jurisdiction; (2) a motion to dismiss for failure to state a claim; and (3) a motion to dismiss for lack of personal jurisdiction. The first two motions (lack of subject matter jurisdiction and failure to state a claim) have been made by various defendants,[1] while the motion to

dismiss for lack of personal jurisdiction has been raised by a single defendant.[2]

The plaintiff in this action originally worked at Mare Island Naval Shipyard. While working at Mare Island, he alleges that he was exposed to the asbestos that is causing his current health problems. It is this exposure that gives rise to his cause of action.

The court finds that the subject matter jurisdiction issue is dispositive and therefore there is no need to resolve the other two issues.

LACK OF SUBJECT MATTER JURISDICTION

The plaintiff originally filed this action under the admiralty jurisdiction of the court as set out in 28 U.S.C. §1333.[3] The defendants move to dismiss the entire complaint, contending that this personal injury action does not have a significant relationship to a traditional maritime activity and therefore is not maintainable

as an admiralty claim. As admiralty is the only basis for federal jurisdiction alleged by the plaintiff, this action must be dismissed if admiralty jurisdiction does not obtain.

The plaintiff alleges that admiralty jurisdiction is proper because "... at the relevant times herein mentioned, he worked in the repair of completed vessels involved in the service of water-based commerce and that his handling of and/or exposure to asbestos products referred to herein arose during such activity." Complaint at 2. Thus, the plaintiff contends that his participation in the repair of maritime vessels brings his claim within the ambit of admiralty jurisdiction.

In analyzing this contention, this court must begin with the controlling Supreme Court directives. Historically, admiralty jurisdiction has been extended

to all torts occurring on the high seas or navigable waters. See, e.g., The Plymouth, 3 Wall. 20, 36 (1866) ("[e]very species of tort, however occurring, whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance.")

In Executive Jet Aviation, Inc. v. City of Cleveland, 404 U.S. 249 (1972), the Court articulated a new standard for defining the scope of admiralty jurisdiction and rejected the traditional test based on "locality." The historical locality test would have conferred admiralty jurisdiction on the Executive Jet cause of action, which involved an airplane crash into the navigable waters of Lake Erie. But in Executive Jet the Supreme Court concluded that this accident did not have a sufficient relationship to traditional maritime activity and that admiralty jurisdiction should not apply.

Executive Jet supplemented the simple locality test with an additional requirement:

> we conclude that the mere fact that the alleged wrong "occurs" or is located on or over navigable waters ... is not of itself sufficient.... It is far more consistent with the history and purpose of admiralty to require also that the wrong bear a significant relationship to traditional maritime activity.

Executive Jet Aviation, Inc. v. City of Cleveland, 404 U.S. at 268.

Subsequent to its decision in Executive Jet, the Supreme Court has emphasized that this "significant relationship to traditional maritime activity" test applies to all cases where admiralty jurisdiction is sought. In Foremost Insurance Co. v. Richardson, ___ U.S. ___, 102 S.Ct. 2654, 2658 (1982), the Court noted that "the Executive Jet requirement that the wrong have a significant connection with traditional maritime activity is not limited to the aviation

context." The clear implication of Foremost Insurance is that any party asserting admiralty jurisdiction must be prepared to demonstrate a significant connection with a traditional maritime activity.

In wrestling with this issue of when admiralty jurisdiction obtains, the Ninth Circuit recently addressed a situation very similar to the instant action. See Owens-Illinois, Inc. v. United States District Court, 698 F.2d 965 (9th Cir. 1983). In Owens-Illinois, the court held that admiralty jurisdiction did not lie in a personal injury action brought by a plaintiff who alleged exposure to asbestos during the construction of new maritime vessels. The court stated:

> we conclude that the torts alleged here, arising solely in the process of new ship construction, lack the "maritime flavor" necessary to invoke the jurisdiction of the federal courts under 28 U.S.C. §1333(1).

Owens-Illinois, 698 F.2d at 970. See also, Hollister v. Luke Construction Co., 517 F.2d 920, 921 (5th Cir. 1975) ("it is also true that since a contract for the building of a ship is non-maritime in character, a tort arising out of work on a launched but incomplete vessel also lacks maritime flavor.")

It is important to note that in Owens-Illinois the Ninth Circuit did not confront the precise issue presently before this court: does admiralty jurisdiction lie in a personal injury action when the tort allegedly occurred during repair of an already completed vessel? Although the question now before this court is a question of first impression in this circuit, the Ninth Circuit has given some suggestion as to how it might ultimately resolve this issue. In reaching its decision in Owens-Illinois, the court looked to the overall nature of the claim and stated:

> Nor does an examination of the other factors persuade us of a significant maritime quality to the claims asserted here. Plaintiff's job, installing and cleaning up around the installation of asbestos, is hardly a distinctively maritime role, in contrast to the navigational functions of the crew of a ship engaged in ocean or river shipping. While ships were obviously involved here, the tools and safety equipment (or lack thereof) present in the installation and clean-up of asbestos -- unlike the navigational equipment and safety devices of a vessel -- possess few maritime attributes. The use of masks, unlike the provision of lifeboats, is hardly a precautionary measure distinctively connected to traditional maritime activity. Finally, the nature of the injury, an asbestos-related disease, and its causation, the unprotected inhalation of asbestos fibers, bear little maritime connection. Both the injury and its cause are far more closely affiliated with the clearly land-based negligence arising in the construction industry generally than with negligence taking place in commerce and navigation on the navigable waters.

Id. at 970-71.

This statement suggests the approach that the Ninth Circuit considers to be proper under Executive Jet. Although this willingness to look at the totality of the

situation was made in the context of an injury alleged during the construction of maritime vessels, it could just as easily apply to the facts alleged by the plaintiff in the instant action involving repair.

Nevertheless, the plaintiff attempts to argue that Owens-Illinois established a meaningful distinction between injuries occurring during construction and repair. Conceding that the Ninth Circuit has excluded construction-related injuries from admiralty jurisdiction, the plaintiff goes on to argue that "in matters of contract, admiralty jurisdiction will lie when the contract relates to repair or navigation . . . ." Plaintiff's Memorandum of Points and Authorities at 2 (emphasis in original). In support of this argument, the plaintiff can only point to language -- best described as dicta -- in Owens-Illinois that states

"Where a contract relates to the repair or navigation of a vessel, a dispute arising from the contract lies within admiralty jurisdiction." 698 F.2d at 970.

The plaintiff's attempt to reply upon this statement falls short and it should not be used to resolve the issue currently before this court. First, the statement relied upon by plaintiff does not -- on its face -- control the instant situation. That statement refers to disputes arising out of contract. The matter before this court sounds in tort. Second, the statement that plaintiff points to is supported only by cases that pre-date Executive Jet; it is not at all clear that it accurately states viable law. Third, and most importantly, the arbitrary distinction that the plaintiff seeks to draw between construction and repair is flatly contradicted by the remainder of the Owens-Illinois opinion

itself, where the court stressed the need for examining the totality of the plaintiff's situation. 698 F.2d at 970-71. In essence, this argument by the plaintiff seeks to take dicta from the Owens-Illinois opinion and use it to turn the logic of the opinion inside out.

The flaw in the plaintiff's argument is made even clearer by examining what the Ninth Circuit chose not to do in Owens-Illinois. In reaching its decision, the Ninth Circuit explicitly refused to follow a previous decision of the Fourth Circuit granting admiralty jurisdiction in a ship construction case after finding that the asbestos containing products involved had a maritime purpose. See White v. Johns-Manville Corp., 662 F.2d 234 (4th Cir. 1981). The White court held that "when the materials used by these shipyard workers were designed, advertised, and marketed as maritime asbestos products,

the Executive Jet criteria have been met and admiralty jurisdiction should be exercised." Id. at 240.

The Owens-Illinois court refused to apply the White rationale to the case before it, noting that there was no showing that the asbestos products involved in Owens-Illinois had been designed, advertised or marketed as maritime products. But even after noting this factual distinction, the Ninth Circuit noted its discomfort with using White as a guidepost when it stated that "we have difficulty with the [White] court's reasoning." Owens-Illinois, 698 F.2d at 971. Significantly, the plaintiff in the instant action has failed to allege that the relevant products were 'designed, advertised, and marketed as maritime asbestos products.' Thus, even if the Ninth Circuit followed White -- which it does not -- the plaintiff's argument would fail.

The intimation contained within Owens-Illinois that admiralty jurisdiction is not available when the only maritime connection occurred during the drydock repair of ships is a conclusion already reached by the First Circuit. In a long and carefully reasoned opinion, Austin v. Unarco Industries, Inc., 705 F.2d 1 (1st Cir.), petition for cert. filed, 51 U.S.L.W. 2631 (U.S. June 28, 1983, No. 82-2164), the First Circuit concluded that admiralty jurisdiction is not available to a personal injury plaintiff who alleged exposure to asbestos during either the construction or repair of maritime vessels. The Austin court concurred with the defendants in rejecting the claim of jurisdiction:

> [The defendant] argues, however, that the decedent's work was not significantly related to traditional maritime activity involving navigation and commerce, as required by the Court in Executive Jet; that injuries to shipyard workers are not a traditional

> concern of admiralty law; and that hte policy justifications for a uniform maritime law do not support admiralty jurisdiction in this case. After much reflection, we agree.

Id. at 11.

The Austin court predicated its decision on what it saw as the underlying purpose of admiralty jurisdiction:

> The law of admiralty has evolved over many centuries, designed and molded to handle problems of vessels relegated to ply the waterways of the world, beyond whose shores they cannot go. That law deals with navigational rules -- rules that govern the manner and direction those vessels may rightly move upon the waters.... It is concerned with maritime liens, the general average, captures and prizes, limitation of liability, cargo damage, and claims for salvage.

Id. (quoting from Executive Jet, 409 U.S. at 270.)

In refusing to extend the scope of admiralty jurisdiction, Austin established a test that is worthwhile and instructive: the only personal injuries that fall within admiralty jurisdiction are those that occur to seamen and others doing

seamen's work. Those performing non-traditional maritime services, even if performed in a shipyard, cannot avail themselves of admiralty jurisdiction. Austin, 705 F.2d at 10. In applying this test to asbestos workers who apparently performed tasks very similar to those performed by the plaintiff in the instant action, the Austin court concluded:

> Under the tests set out above, the plaintiff's decedent would plainly be excluded. The ships on which he worked were out of navigation and the work was major, requiring special equipment and skills. It was not work traditionally done by members of the crew. More important, if the reason for admiralty's special concern for the care and safety of seamen is that they are exposed to the peculiar hazards of the sea and a vessel's equipment, then the dangers faced by a shipyard worker installing asbestos insulation are scarcely traditional concerns of admiralty or is there any reason to expect an admiralty court to possess expertise in addressing those dangers.

Id. at 12.

The Austin court's refusal to extend admiralty jurisdiction in this setting

also accords with federalism concerns. The risks encountered by the plaintiff engaged in repair of ships differ little, if at all, from the risks encountered by dry land construction workers installing or repairing similar asbestos products. These similarly situated dry land workers cannot avail themselves of federal jurisdiction; they must press their claims in state court. It is thus difficult to fashion a rationale for permitting the instant plaintiff to pursue his action in federal court when similarly situated plaintiffs who worked on dry land are barred from this court. As the Supreme Court has expressed increasing reluctance in recent years about widening the scope of admiralty jurisdiction, see Victory Carriers, Inc. v. Law, 404 U.S. 202, 212 (1971), this court must be sensitive to going beyond the permissible scope of admiralty.

Thus, the court concludes that the defendants' motion to dismiss for lack of subject matter jurisdiction should be granted. Although the Ninth Circuit has not yet spoken definitively on this issue, the more well reasoned trend of the case law avoids extending admiralty jurisdiction unless there is a significant relationship to traditional maritime activity.

In this case, it was irrelevant that the alleged tort occurred aboard ship; no facts have been alleged that demonstrate why there is a significant connection to a traditional maritime activity. Applying the test laid out by the Supreme Court in Executive Jet and the First Circuit in Austin, the defendant's motion for dismissal for lack of subject matter jurisdiction will be granted.

Accordingly, there is no need to address either of the remaining two motions.

SO ORDERED.

DATED: November 30, 1983

/s/Robert F. Peckham
Chief United States District Judge

FOOTNOTES

1/ The following defendants have joined in the first two motions: Armstrong World Industries, Inc.; U.S. Gypsum Co.; The Flintkote Co.; Fibreboard Corp.; Keene, Corp.; Keene Building Products Corp.; Owens-Corning Fibreglas Corp.; Nicolet, Inc.; Celotex Corp.; PPG Industries; ACandS, Inc.; Standard Insulations, Inc.; Eagle-Pitcher Industries, Inc.

2/ The Standard Asbestos Mfg. & Insulating Co.

3/ The text of 28 U.S.C. §1333 reads as follows:

> The district courts shall have original jurisdiction, exclusive of the courts of the States, of:
>
> (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

(2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

CLARENCE FRANCOIS, Plaintiff, v. RAYBESTOS-MANHATTAN, Defendants.	)	No. C-83-2737 RFP
	)	JUDGMENT

The defendants in this action have moved to dismiss the plaintiff's cause of action on three separate grounds. Upon consideration of the memoranda filed in support of and in opposition to these motions, and upon consideration of the oral arguments made by counsel, the court rules as follows.

The defendants have moved to dismiss the plaintiff's claim on the grounds that there is no admiralty jurisdiction in this case. For the reasons outlined in the memorandum of decision that accompanies this judgment, the court concludes that

there is no admiralty jurisdiction in this case and that the entire action must be dismissed. Thus, there is no reason for the court to reach the remaining two jurisdictional issues raised by the defendants.

Accordingly, the defendants motion to dismiss for lack of subject matter jurisdiction is granted. Let judgment be entered accordingly.

SO ORDERED.

Dated: December 1, 1983.

/s/ Robert F. Peckham
Chief United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CLARENCE FRANCOIS, Plaintiff-Appellant vs. RAYBESTOS-MANHATTAN, INC.; OWENS-ILLINOIS CORP.; OWENS-CORNING FIBERGLAS CORP.; THE CELOTEX CORP.; ARM-STRONG CORK COMPANY; NICOLET INDUSTRIES, INC.; H.K. PORTER CO. INC., et al., Defendants-Appellees	NO. 83-2660 D.C. NO. CV 83-2737-RFP MEMORANDUM*

Argued and Submitted October 3, 1984
Appeal from the United States
District Court for the Northern
District of California
Hon. Robert F. Peckham,
District Judge, Presiding

Before: BROWNING, ANDERSON, and REINHARDT, Circuit Judges.

The district court dismissed Francois' claim for lack of subject matter jurisdiction, finding the tort action not sufficiently related to traditional mari-

time activity to justify the exercise of federal admiralty jurisdiction. We affirm.

In Owens-Illinois v. United States District Court, 698 F.2d 967 (9th Cir. 1983) (per curiam), we indicated that four factors must be considered in order to determine whether an alleged tort bears a significant relationship to traditional maritime activity: "(1) traditional concepts of the role of admiralty law; (2) the function and role of the parties; (3) the types of vehicles and instrumentalities involved; and (4) the causation and nature of the injury suffered." Id. at 970.

After carefully considering these factors, this court has recently concluded that an employee's tort action, arising from exposure to asbestos-related products during the repair of ships, does not bear a significant relationship to traditional

maritime activity and thus is not cognizable as an admiralty claim. Myhran v. Johns-Manville Corp., Nos. 82-3660, 82-3661 (9th Cir. Aug. 27, 1984). While the plaintiff in Myhran was a pipefitter and Francois is a painter, their tort claims are identical in all significant respects. Accordingly, Myhran is dispositive here.

AFFIRMED.

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* The panel has concluded that the issues presented by the appeal do not meet the standards set by Rule 21 of the Rules of this court for disposition by written opinion. Accordingly, it is ordered that disposition be by memorandum, forgoing [sic] publication in the Federal Reporter, and that this memorandum may not be cited to or by the courts of this circuit.